Hian was the great-grand father of Khoo Seng Seng, one of the present applicants.

To paraphrase then, the trust is for the benefit of "Chinese household divinity, *Bee Siok*, remoter ancestor" and of "Chinese household divinity, *Ee Hian*, ancestor."

The words in the recital give no assistance, for money cannot belong to an idol (cf. *Attorney-General* v. *Thirporee Soonderee.* 1 Kyshe. p. 377), and, though it is stated that the Purchasers are trustees for the said Josses, there is no evidence as to the original source of this money.

I can find no other words throwing light on the intention of the Purchasers, and therefore that intention must be ascertained solely from the expression "to apply such rents and profits for the benefit of the said Joss "*Bee Siok Chor*" and the said Joss "*Ee Hian Kong.*"

Does this expression constitute a charitable use?

I have no hesitation in deciding that it does not.

A trust is not deemed a trust for a charitable use unless it benefits the public or a section or class of the public.

If the expression under consideration is to be construed very narrowly, only the two Josses are benefited, and they are not a class or section of the public.

But under the circumstances of this case, I think the Court ought to find, and therefore I do find, that some sort of ancestor-worship was intended.

Now the Josses might be benefited in two ways

(a) materially, by the construction, repair or improvement of a temple, tomb, grave-yard, shrine, or similar work.

(b) spiritually, by the performance of ancestral rites, or religious ceremonies.

As to (a): in my opinion the expression under consideration cannot be construed to denote an intention of benefiting by new works any person other than the remote ancestor and his family: as regards existing works, there is an indication of the existence in China of a temple, a tomb, a grave-yard and a shrine, but in my opinion the existence of none of these things has been satisfactorily proved, and if it had been proved, there is no evidence that the temple or grave-yard was available for any class or section of the public, and a tomb or shrine is of no benefit to the public unless it is proved to be part of the fabric or ornamentation of such a temple, and that again has not been proved: hence I am compelled to hold that the trust, so far as concerns its material aspect, is not for a charitable use.

As to (b): in construing the will the Court may properly take Chinese family usages into consideration; though the performance of these usages, with the accompanying religious ceremonies, may be considered by the Chinese to be a pious duty, yet there is no evidence that they can benefit or solace any person other than members of the family itself; their observance therefore can lead to no public advantage, and the pious duty does not fall within the definition of a charitable duty or use.

The Court was asked to find that the descendants of *Bee Siok* are now so numerous that they may properly be held to constitute, not a family but a class or tribe, and therefore a section of the public.

No authority was quoted in support of this proposition and it does not appear to me to be reasonable. The Courts have frequently decided that a gift for the family of a Settlor is bad, and I can see no reason for holding that a gift for the family of a settlor's great-great-great grand father ought to be regarded as good.

Furthermore, I can find no general charitable intent indicated by the assignment as a whole.

I hold that as regards both assignments the gifts are not for a charitable use, and therefore they are void as being opposed to the rule against creating perpetuities. The relief prayed for must be refused.

The costs of all parties will be taxed as between solicitor and client and paid out of the estate.

Application refused.

Solicitors for Applicant—*John G. Campbell & Co.*

Solicitor-General for Attorney General.

Solicitors for Trustees and persons appointed to represent parties interested—*Allen & Gledhill.*

[APPELLATE JURISDICTION]

HUGGARD, C. J., GERAHTY AND MILLS, JJ.

October 14, 1933.

REX v. RETNAM.

[MALACCA ASSIZE CASE (CRIMINAL) No. 9 OF 1933]

REX v. CHAJI RAM.

[MALACCA ASSIZE CASE (CRIMINAL) No. 10 OF 1933]

Criminal Procedure Code S.136(1)—Sanction of Public Prosecutor—Sanction of Court —Validity of sanction.

Once the Public Prosecutor or his duly authorised deputy has exercised the discretion vested in him by Section 136 of the Criminal Procedure Code to grant or refuse a sanction and such exercise of discretion is evidenced in writing in accordance with the statutory requirements of Section 136 (3), the Court has no power either to interfere or to examine the grounds upon which such discretion has been exercised.

A Magistrate is in a different position from the Public Prosecutor inasmuch as the Code itself contains express provisions which enable his decisions to be reviewed.

The granting or refusing of a sanction by a Magistrate is an "order" within the meaning of S. 295 of the

Criminal Procedure Code and as such it is subject to appeal under that section or to revision under S. 312 A.

The validity of a sanction to prosecute under S. 211 of the Penal Code, whether given by the Public Prosecutor or by a Magistrate is not affected merely because the original complainant has not been given an opportunity of substantiating his charge or of withdrawing it.

The circumstances in which a Magistrate may properly grant a sanction for a prosecution under S. 211 of the Penal Code discussed.

Point of law reserved by Judge of Supreme Court.

In these two Assize cases (trials by Jury) the accused were charged with making false charges of offences with intent to injure, under S.211 of the Penal Code.

The Deputy Public Prosecutor had withdrawn their original complaints from the Magistrates and had given his sanction to prosecute the two accused without having given them an opportunity of substantiating or withdrawing their original complaints. At the trial the Accused were not represented by Counsel. The Deputy Public Prosecutor informed the trial Judge that it had recently been decided in an Assize Case in Singapore that a sanction given by the Deputy Public Prosecutor in such circumstances was invalid. The cases proceeded and the Accused were convicted, the Trial Judge (Gerahty, J.) reserving the point of law for the decision of the Supreme Court under S.312 of the Criminal Procedure Code.

K. K. O'Connor (assigned) for the Accused.

Bassett, D. P. P. for the Crown.

Cur. Ad. Vult.

HUGGARD, C. J., GERAHTY AND MILLS, JJ.—At the Assizes held at Malacca on the 9th day of August, 1933, certain questions of law which arose in the course of the trials of the abovenamed Accused were reserved by Gerahty J. for the decision of the Supreme Court under section 312 of the Criminal Procedure Code.

In the first case—*Rex* v. *Retnam*—the case as stated by the learned trial Judge was as follows:—

> The accused, Retnam, was convicted on 9th August, 1933, of an offence under Section 211 of the Penal Code and was sentenced to 1 year's rigorous imprisonment.
>
> On the 24th April, 1933, the accused made a report to the Police accusing one Mukan and two other Tamils of assaulting him and of robbing him of certain articles.
>
> Mukan and the two other Tamils were in consequence duly charged and taken before the Magisterial Court. The charge was not proceeded with and was withdrawn on instructions from the Deputy Public Prosecutor.
>
> The Deputy Public Prosecutor acting under the powers delegated to him under Section 384 (3) of the Code and Gazette Notification No. 2263 dated 25th November, 1932, gave the sanction to prosecute Retnam upon a charge under Section 211 of Penal Code as required by Section 136 (1) (b) of Ordinance No. 121 (Criminal Procedure Code).
>
> The following questions have been reserved by me for the decision of the Supreme Court:—
>
> 1. Has the Court power to question the validity of a sanction once it has been given under the provisions of Section 136 of the Criminal Procedure Code?
> 2. If so, is the validity of such sanction affected merely because the accused, in his capacity of a complainant, has not been given an opportunity of substantiating his charge or of withdrawing?
>
> Pending the decision of the Supreme Court, the accused has been granted an opportunity of giving bail in the sum of $500 with two sureties and in default of his so giving bail I have ordered that he be remanded to prison in accordance with the provisions of Section 312 (2) of the Criminal Procedure Code.

For all practical purposes the facts and questions reserved in the second case are the same and therefore the questions reserved in both cases can be conveniently disposed of together.

The first question to be considered is whether the Court has power to question the validity of a sanction once it has been given under the provisions of Section 136 of the Code.

We are only immediately concerned with a sanction in relation to an offence punishable under Section 211 of the Penal Code and in this connection it is necessary to set out the relevant provisions of Section 136 of the Code:

> "136. (1) No Court shall take cognizance
>
> (*b*) of any offence punishable under section 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 or 228 of the same Code, except with the previous sanction of the Public Prosecutor or, when such offence is committed in or in relation to any proceeding in any Court, with the previous sanction of or on the commital by such Court.
>
> (3) The sanction referred to in this section may be expressed in general terms and need not name the accused person but it shall, so far as practicable, specify the Court or other place in which and the occasion on which the offence was committed.
>
> (5) No such sanction shall remain in force unless acted upon within one month from the date on which it was given."

It is to be observed that this section vests in two different authorities the power to sanction prosecutions for the various offences named therein, viz:—

(1) The Public Prosecutor (whose powers may be delegated to the Deputy Public Prosecutors under Section 384 (3) of the Code and have been so delegated under Gazette Notification No. 2263 dated 25th November, 1932) in respect of any or all of the offences set out, or—

(2) The Court, when the offence is committed in or in relation to any proceeding in such Court.

For this reason both questions reserved must be examined separately in regard to each of the authorities established by the section, for it will be seen later that different considerations apply.

Our first task then will be to consider Question 1 in relation to the powers conferred upon the Public Prosecutor and his duly authorised deputies.

On a literal construction the section vests in the Public Prosecutor the sole discretion to grant or refuse a sanction without restriction or limitation. The only statutory requirement is that while a sanction so granted may be expressed in general terms it shall, so far as practicable, specify the Court or other place in which, and the occasion on which, the offence was committed.

The clear implication of sub-section (3) is that the sanction must be in writing. Further sub-section (5) requires that the sanction must be acted upon within one month from the date on which it was given.

Provision for the status and powers of the Public Prosecutor has been made in Chapter XXXIV of the Code.

Section 384 (1) provides that the Attorney-General shall be the Public Prosecutor and shall have the control and direction of criminal prosecutions and proceedings under the Code. Sub-section (3) empowers the Governor to appoint officers "to assist the Attorney-General or to act as his deputies in the performance of any of the functions or duties of Public Prosecutor" under the Code.

It would appear that the position and duty of the Public Prosecutor in this Colony is similar in all material respects to the office of the Director of Public Prosecutions in England as established by 42 & 43 Vict. c. 22.

In *Ex parte Hubert & Co.*, 15 Cox's C.C. 166, Pollock, B. in referring to that Act says:—

> "It seems therefore that the intention and object of that Act were, owing to the manifold duties of the Attorney-General, to appoint another officer to act under his superintendence, so as to relieve him to some extent of the onerous duties cast upon him. One of these duties is, as is well known, to grant his fiat in certain cases for criminal prosecutions."

The only difference here is that the Attorney-General is himself the Public Prosecutor while his assistants work under his control and direction.

In the same judgment Pollock, B. states:—

> "It has never yet been suggested that the exercise by the Attorney-General of the discretion vested in him either by the Common Law or by Statute, has been controlled by this Court."

In that case the Director of Public Prosecutions had refused to grant his fiat under the Newspaper Libel & Registration Act, 1881, (44 & 45 Vict: c.60,s.3.) for a criminal prosecution against the proprietor &c. of a newspaper for a libel published therein. It was contended, in support of an application for a rule *nisi* calling on the Director to show cause why a mandamus should not issue commanding him to grant his fiat, that under the Act the Director of Public Prosecutions was bound to grant his fiat as soon as it appeared that the publication complained of was libellous, and that he could not exercise his discretion as to whether the libel was a serious or trivial one, or whether a civil action for damages would answer every purpose.

The relevant section of 44 and 45 Vict: c. 60 is section 3 which enacts that "No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein *without the written fiat or allowance of the Director of Public Prosecutions in England*, or Her Majesty's Attorny-General in Ireland, being first had and obtained."

Pollock, B. in his judgment comments as follows:—

> "That Act was a kind of settlement between the public on the one hand and the newspaper proprietors on the other. On the one hand the names of the proprietors of newspapers are to be registered under the Act, and on the other they are to be protected from what the Legislature deemed to be not necessarily trivial, but improper or unnecessary, criminal prosecution for libel. Accordingly the discretionary power given to the Director of Public Prosecutions by section 3 does not deal with the question of 'libel or no libel.' It assumes a libel and also that there may be cases of libel in which it is not desirable that there should be a criminal prosecution, hence a discretion is given to the Director of Public Prosecutions to allow or not to allow his fiat for a criminal prosecution.....It appears to me to be clear that the discretion is vested solely in him by the Act.....There

is no reasonable doubt as to the construction of Section 3 and therefore no rule will be granted."

Similarly it seems to us that there is no reasonable doubt as to the construction of Section 136 of the Code and that the discretion to grant or refuse a sanction is vested solely in the Public Prosecutor, and this Court cannot interfere once the Public Prosecutor has exercised his discretion.

In our view this in no way conflicts with the decision of the Court of Appeal in the case of *The Straits Steamship Coy: Ltd.* v. *Lieut. J. H. Owen, D.S.O., R.N.R.*, 1932 S.S.L.R., 145. In that case it was clear on the face of the evidence before the Court that the Harbour Master had not in fact exercised the discretion imposed upon him to grant or refuse his sanction under Section 144 of Ordinance No. 125 (Merchant Shipping) but had refused the sanction as a result of instructions received by him from the Colonial Secretary. The Court held that a mandamus could properly issue to the Harbour Master to exercise his discretion in granting or refusing sanction to prosecute.

In other words where a discretion is vested in a particular officer that discretion must be exercised by that officer personally and if that has not been done the Court will interfere, but only so far as to direct him to exercise his discretion in one way or the other.

It is not, in our view, an authority for holding that the Court has power to interfere once that discretion has been exercised, still less that the Court has power to question the grounds upon which such discretion has or has not been exercised or to direct in what manner such discretion should be exercised.

The observation of Terrell, J. in his judgment on p.174 seem to us to be directly in point. He says:—

> "It might possibly have been more satisfactory if the Legislature had thought fit to specify the manner in which the Harbour Master should exercise his discretion instead of leaving it as an inference to be drawn from the Ordinance as a whole, but I have little doubt that in giving the discretion in such wide terms the Legislature placed confidence in the honesty and integrity of a qualified professional officer and relied upon him to enforce the provisions of the Ordinance without fear or favour.
>
> "The result, however, of giving the discretion in such wide terms is that the Harbour Master could refuse his sanction without assigning any reason and the Courts might be compelled to presume that in such a case the discretion had been honestly exercised, although in fact it might have been exercised on grounds entirely alien to the intention of the Legislature. Fortunately, in the present case the question does not arise as the Harbour Master did not in fact exercise his discretion at all, having merely obeyed the directions of the Executive."

We are of opinion then that once the Public Prosecutor or his duly authorised deputy has exercised the discretion vested in him by Section 136 of the Code to grant or refuse a sanction and such exercise of discretion is evidenced in writing in accordance with the statutory requirements of Section 136 (3), the Court has no power either to interfere or to examine the grounds upon which such discretion has been exercised.

It follows therefore that the answers to Questions 1 and 2 in so far as they relate to sanctions granted by the Public Prosecutor must be in the negative.

We now come to consider the reserved questions in their relation to sanctions granted by the Court. As has been mentioned earlier in this judgment, different considerations arise where the sanctioning authority is the Court, for, whereas the Public Prosecutor in granting or refusing a sanction is acting in the capacity of an executive officer upon whom wide powers have been conferred by the Code, a Magistrate is in a different position inasmuch as the Code itself contains express provisions which enable his decisions to be reviewed. It is clear, in our opinion, that the granting or refusing of a sanction by a Magistrate is an "order" within the meaning of section 295 of the Code and as such it is subject to appeal under that section or to revision under section 312A.

The answer to Question 1, therefore, so far as it relates to sanctions granted by a Magistrate, is necessarily in the affirmative.

As regards Question 2 in its relation to sanctions granted by the Court, some difficulty arises from the fact that there would seem to be a conflict of judicial decisions in India upon this point and we are indebted to Mr. O'Connor for his careful review of those cases. One line of cases indicates that certain of the Indian Courts have held that, before a sanction for a prosecution under section 211 of the Penal Code can properly be granted by a Magistrate, the original complainant ought to be given an opportunity of substantiating, if he can and so desires, the charge which he has brought. That would seem to denote that not only should the complainant and his witnesses be heard but also that the person against whom he has made the charge must be put upon his trial.

With the greatest respect we are not prepared to go so far as, apparently, some of the Indian decisions have gone. In *Queen Empress* v. *Raghu Tiwari*, 15 All:336, which was a case before the Revisional Criminal Court of three Judges, the Court in dealing with a charge under

section 182 of the Penal Code (i.e. giving false information to a public servant) observed as follows:—

> "In our opinion it would be absurd that the informant should be called upon to proceed with a false charge which inquiries had shown to be false, and that the proceedings against him under section 182 should be delayed until the informant, and such witnesses as he might be able to call in support of his complaint, had had afforded to them by the Magistrate an opportunity of committing the further offence of perjury."

It appears to us that this observation is equally appropriate in cases to which section 211 the Penal Code applies.

It is our view, therefore, that the validity of a sanction to a prosecution under section 211 of the Penal Code is *not* affected merely because the original accused, in his capacity of a complainant, has not been given an opportunity of substintiating his charge; and the answer to Question 2, so far as it relates to sanctions granted by a Magistrate, is consequently in the negative.

Although the reserved questions have now been answered we consider it desirable to go a little further and to indicate briefly, for the guidance of Magistrates, our views as to the circumstances in which a Magistrate may properly grant a sanction for a prosecution under section 211 of the Penal Code.

It is essential in our opinion that before a Magistrate may grant a sanction in such a case the original complaint must have been legally disposed of, that is to say, either by the withdrawal of the charge by the Public Prosecutor or his duly authorised deputy, or by the abandonment of the charge by the complainant, or by the dismissal of the complaint by the Magistrate.

If the original complaint has been legally disposed of as indicated above it is then competent for a Magistrate to grant his sanction, but inasmuch as in granting or refusing a sanction the Magistrate is performing a judicial act he should not grant his sanction unless he has materials before him upon which he can form an opinion as to the existence of a *prima facie* case.

In cases where the original charge has been withdrawn by the Public Prosecutor or has been abandoned by the complainant, the Magistrate may not have him any such materials as would enable him to form an opinion whether or not a prosecution under section 211 ought to be sanctioned. In such cases we consider that the Magistrate's proper course would be to refuse to grant his sanction and to leave the matter in the hands of the Public Prosecutor.

Where, on the other hand, the original complaint has been dismissed by the Magistrate under section 142 of the Code (i.e. after examining the complainant on oath, recording his examination, and considering the result of the inquiry, the Magistrate is entitled to grant his sanction if the evidence is in his opinion sufficient to raise a *prima facie* presumption that the complainant has committed an offence under section 211 of the Penal Code.

The orders in both the present cases in which questions have been reserved will be that the convictions and sentences are confirmed. As both accused failed to find bail and remained in custody we order that the sentences shall be deemed to run from the date of conviction.

Order accordingly.

THE END OF STRAITS SETTLEMENTS LAW REPORTS.